BEFORE THE WORLD TRADE ORGANIZATION

Russia – Measures Concerning Traffic in Transit
(WT/DS512)

Third Party Written Submission of Australia

8 November 2017
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I. INTRODUCTION

1. Australia considers that this dispute raises significant issues regarding the invocation and interpretation of Article XXI(b) of the General Agreement on Tariffs and Trade 1994 (the GATT 1994) as well as the rights and obligations of WTO Members and the proper function of panels provided for under the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).

2. In this submission, Australia focuses on the fundamental question of whether a panel has jurisdiction to review a matter where a Member invokes Article XXI(b) of the GATT 1994, and in what circumstances, if any, a Panel has the authority to decline jurisdiction. Australia also provides some views on the invocation of Article XXI(b).

3. Australia reserves the right to raise other issues at the third party hearing with the Panel.

II. JURISDICTION OF A PANEL TO REVIEW A MATTER WHERE A MEMBER INVOKES ARTICLE XXI(b)

4. In its First Written Submission, Russia appears to suggest that a Member's invocation of Article XXI(b) automatically takes a dispute outside the jurisdiction of a panel.1

5. Russia submits that neither the Panel nor the WTO as an institution has jurisdiction over this matter2 on the basis that the measures Ukraine has challenged were introduced pursuant to Russia's right "to take any action which it considers necessary for the protection of its essential security interests in the time of war or other emergency in international relations".3

(i) Does the Panel have jurisdiction to consider this matter?

6. Article 7(1) of the DSU defines a panel's standard terms of reference as: to examine the matter referred to it, in the light of the relevant provisions in the covered agreement(s) cited by the parties to the dispute; and make such findings as will assist in making the recommendations or rulings provided for in the relevant agreement(s). Article 7(2) of the DSU further provides that panels "shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute".

7. The Appellate Body has explained that the use of the words "shall address" indicates that panels are in fact "required to address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute".4

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1 First Written Submission of the Russian Federation, para. 47.
2 First Written Submission of the Russian Federation, para. 7. (emphasis added)
3 First Written Submission of the Russian Federation, para. 5.
4 Appellate Body Report, Mexico – Taxes on Soft Drinks, para 49. (emphasis added)
8. The Panel in this dispute was established with these standard terms of reference.5

9. In this dispute, Ukraine has cited Articles V:2, V:3, V:4, V:5, X:1, X:2, X:3(a), XI:1 and XXIII:1 of the GATT 1994, claiming that the measures at issue violate Russia's obligations with respect to these provisions. Russia has cited Article XXI(b)(iii) of the GATT 1994 as a complete defence to Ukraine's claims of violation (while also advancing additional arguments related to temporal matters).

10. In Australia's view, it follows that Article 7 of the DSU vests the Panel with the jurisdiction to examine and make findings with respect to each of the "relevant provisions in the covered agreements" that Ukraine and Russia have cited. Australia therefore disagrees with Russia's submission that the Panel does not have jurisdiction over this matter.

(ii) Does the Panel have the discretion to decline to exercise its jurisdiction?

11. As outlined above (at paragraphs 6 and 7), Article 7 of the DSU does not simply empower a panel to address the relevant provisions of the covered agreements cited by the parties, but in fact requires a panel to do this.

12. In discharging this adjudicative function, Article 11 of the DSU obliges a panel to:

   … make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.

13. More broadly, Article 3.2 of the DSU recognises that the dispute settlement system: (i) is a "central element in providing security and predictability to the multilateral trading system"; and (ii) serves to preserve the rights and obligations of Members under the covered agreements. This is reinforced by Article 3.3 of the DSU, which highlights that the ability of Members to bring disputes "is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members".

14. In addition, Article 19.2 of the DSU prohibits a panel from making findings that would "add to or diminish the rights and obligations provided in the covered agreements".

15. The Appellate Body has confirmed that the dispute settlement system is the fundamental means through which Members' rights and obligations are enforced:

   … allowing measures to be the subject of dispute settlement proceedings ... is consistent with the comprehensive nature of the right of Members to resort to dispute

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5 Dispute Settlement Body – Minutes of meeting held in the centre William Rappard on 21 March 2017 (WT/DSB/M/394).
16. The Appellate Body has also recognised that, while panels enjoy some discretion in discharging their core adjudicative function, "this discretion does not extend to modifying the substantive provisions of the DSU".  

17. In addition, in examining a panel's obligation in Article 11 of the DSU, the Appellate Body has observed that "[i]t is difficult to see how a panel would fulfil that obligation if it declined to exercise validly established jurisdiction and abstained from making any finding on the matter before it".  

18. Furthermore, the Appellate Body has noted that a Member's right under Article 3.3 of the DSU to initiate a WTO dispute when it considers that benefits accruing to it are being impaired by another Member implies that a Member "is entitled to a ruling by a WTO panel".  

19. It was on the basis of these rights and obligations – with respect to both Members and panels – that the Appellate Body upheld the panel's conclusion in Mexico – Taxes on Soft Drinks that "under the DSU, it ha[d] no discretion to decline to exercise its jurisdiction in that case that ha[d] been brought before it". 

20. In Australia's view, if the Panel were to decline to exercise its jurisdiction in this matter, this would deprive Ukraine of its rights under Articles 3.2 and 3.3 of the DSU to bring a dispute in order to remedy the benefits it considers Russia's measures are impairing.  

21. Australia considers that declining to exercise jurisdiction in this dispute would also be inconsistent with the Panel's obligations under Articles 7, 11 and 19.2 of the DSU to: (i) address the relevant provisions of the covered agreements cited by Ukraine and Russia; (ii) make an objective assessment of this matter, including an objective assessment of the facts and the applicability of and conformity with the relevant provisions of the GATT 1994; and (iii) not add to or diminish the rights and obligations of either Ukraine or Russia.  

22. Accordingly, in order to give full effect to the rights and obligations provided in the DSU, Australia submits that the Panel cannot decline to exercise its jurisdiction to address the matters before it.

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7 Appellate Body Report, India-Patents (US), para. 92. (emphasis added)  
8 Appellate Body Report, Mexico – Taxes on Soft Drink, para. 51.  
9 Appellate Body Report, Mexico – Taxes on Soft Drink, para. 52. (emphasis original)  
(iii)  Does the nature of Article XXI(b)(iii) alter the scope of the Panel's jurisdiction?

23. Article XXI(b)(iii) of the GATT 1994 provides:

   Nothing in this Agreement shall be construed … to prevent any [Member] from taking any action which it considers necessary for the protection of its essential security interests … taken in time of war or other emergency in international relations.

24. The chapeau text of Article XXI(b)(iii) therefore indicates a subjective standard that permits a Member to determine for itself what action "it considers necessary" to protect "its essential security interests".

25. Therefore, while Australia considers that the Panel has jurisdiction in this matter Australia emphasises that – in exercising its jurisdiction – the Panel must fully respect the significance of the matters dealt with by Article XXI(b)(iii). The critical importance of the national security interests to Members' fundamental sovereignty was pivotal in the careful drafting of the provisions and the clear deference provided to Members in the text.

III. CONCLUSION

26. In order to give proper effect to Members' rights and obligations under the WTO covered agreements, and to the Panel's obligations and terms of reference under the DSU, Australia submits that the Panel should exercise its jurisdiction to address all relevant provisions in the GATT 1994 cited by Ukraine and Russia in this dispute, including Article XXI(b)(iii).